TENTATIVE RULINGS: CIVIL LAW & MOTION

Wednesday, March 1, 2023 at 3:00 p.m.
Courtroom 18 – Hon. Christopher M. Honigsberg
Civil and Family Law Courthouse
3055 Cleveland Avenue
Santa Rosa, California 95403

The Court's Official Court Reporters are "not available" within the meaning of California Rules of Court, Rule 2.956, for court reporting of civil cases.

CourtCall is not permitted for this calendar.

If the tentative ruling does not require appearances, and is accepted, no appearance is necessary.

Any party who wishes to be heard in response or opposition to the Court's tentative ruling **MUST NOTIFY** the Court's Judicial Assistant by telephone at **(707) 521-6723** and **MUST NOTIFY all other parties of their intent to appear, the issue(s) to be addressed or argued and whether the appearance will be in person or by Zoom**. Notifications must be completed no later than 4:00 p.m. on the court (business) day immediately before the day of the hearing.

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Unless notification of an appearance has been given as provided above, the tentative ruling shall become the ruling of the Court the day of the hearing at the beginning of the calendar.

1. SCV-263436, Avery v. Wine Country Senior Living, Inc.

Defendants' motion for summary adjudication is DENIED in full. The parties' objections are addressed below. Plaintiffs' request for judicial notice is GRANTED. Plaintiffs' counsel shall submit a written ruling consistent with this tentative ruling and in compliance with Rule 3.1312.

The Court notes that Defendants filed a 21 page reply brief of which 15 pages constitute the memorandum in reply. Pursuant to Rule of Court 3.1113, memorandums in reply on motions for summary judgment may not exceed 10 pages. Accordingly, the Court will consider only the first 10

pages of the memorandum.

Objections:

Plaintiffs' objection to Defendants' evidence is OVERRULED. The following objections made by Defendants are SUSTAINED: objection numbers 9, 10, 11, 12, 13, 17, 18, 19, 20, and Plaintiffs' additional undisputed material facts numbers 41 and 73. The remaining objections made by Defendants are OVERRULED.

Underlying Facts:

This is a wrongful death survival action brought by Martha Avery, the wife of the decedent, George Avery, and his adult children, Marc Avery, Christopher Avery, Kathi Doidge, and Sara Obstarczyk. (Undisputed Material Fact "UMF," 1.) Defendant Wine Country Senior Living ("WCSL") is a residential care facility for the elderly in Sonoma County. (UMF, 2.) Defendant Mera Shaughnessy is a shareholder of WCSL and is involved in the day-to-day management of WCSL. (UMF, 3.) Defendant Shaughnessy was involved with the arrangements for George Avery's residency at WCSL and primarily dealt with Martha Avery. (UMF, 4.) George was admitted to WCSL on October 30, 2017, and left on November 9, 2017. (UMF, 5-6.) At the time of George's admission to WCSL, he suffered from Lewy Body Dementia and Alzheimer's Disease, meaning he needed assistance with all activities of daily living. (UMF, 7.)

WCSL submits that during his residence, George was combative, refused to eat or drink, and refused to take his medication. (UMF, 9-13.) WCSL also submits that Martha Avery was notified of this. (UMF, 10.) WCSL obtained George's physician's permission to crush his medication. (UMF, 12.) WCSL suggested to Martha that she consider hospice care for George. (UMF, 11.) George was discharged from WCSL on November 9, 2017. (UMF, 14.) After being discharged, George received hospice care at home and passed away on November 20, 2017. (UMF, 16.) Martha Avery was reimbursed the balance of funds after George was discharged. (UMF, 17.)

Martha Avery submits that because of George's disease, he needed assistance with most daily activities including rising to his feet, walking, eating, drinking, grooming, toileting, self-hygiene, and administering medication. (Plaintiffs' Additional Undisputed Material Facts "PAMF," 14.) George was 81 years old at the time of his residence with WCSL, making him an "elder" within the meaning of Welfare & Institutions Code § 15610.27. (PAMF, 1-2, 7.) Defendants were "care custodians" in a trust relationship with George within the meaning of Welfare & Institutions Code § 15610.17. (PAMF, 8.) Plaintiffs allege that prior to George's residency at WCSL, Martha informed both WCSL and Mera Shaughnessy of George's condition, his diminishing faculties, and his need for assistance with virtually all activities of daily living. (PAMF, 16.) Plaintiffs submit that Martha was informed by Mera Shaughnessy that WCSL would provide excellent 24-hour care to George. (PAMF, 17.) They promised adequate staffing and that they would care for George's specific and daily needs. (PAMF, 18.)

Several months prior to George's residence at WSCL, Defendant Shaughnessy visited

George and Martha at their home and they explained to Defendant Shaughnessy George's specific needs with eating, drinking, grooming, toileting, self-hygiene, administering medication, entertainment and stipulation, as well as George's interests such as music, TV, juice, and his preference for being out of bed most of the day. (PAMF, 19-21.) Defendant Shaughnessy responded that George would be a good candidate to be placed at WCSL. (PAMF, 22.) Plaintiffs submit that during this home interview, Defendant Shaughnessy specifically promised the following:

1) Defendants would assist in administering George's medication and would follow his physician's orders;
2) Defendants would assist George with grooming and self-hygiene, such as bathing, brushing teeth, dressing, toileting;
3) Defendants would provide George stimulation and entertainment such as music and television.
4) Defendants would provide food, meals and beverages and assist George with eating and drinking;
5) If anything adverse was observed in George, Martha would be notified immediately.

(PAMF, 23.) Defendants were also informed in writing of George's particular needs. (PAMF, 25.)

A physician's report provided to WCSL prior to George's admission states that George cannot manage his own treatment/medication/equipment; that George requires medication assistance; that George's dementia included cognitive functions sufficient to interfere with an individual's ability to perform activities of daily living; that George was unable to bathe or groom himself and was unable to use the toilet himself. (PAMF, 26.) Prior to George's admission, his doctor described his health as "fair." (PAMF, 28.) Martha also explained all of these needs in George's intake forms. (PAMF, 29-32.) The form agreement stated that WCSL would provide assistance with taking prescribed medication and basic services of assisting George with personal activities of daily living including dressing, eating, toileting, bathing, grooming, mobility tasks, etc. (PAMF, 33-35.) The form also stated that WCSL would observe George for changes in physical, mental, emotional and social function and notify George's family and physician. (PAMF, 25.) Plaintiffs submit that Defendants' oral and written representations induced Martha to sign the form agreement and place George into WCSL's care. (PAMF, 36.)

WCSL determined "quickly" upon George's admission that his needs could not be met by them. (PAMF, 43.) Plaintiffs submit that Defendants failed to meet George's basic needs including failing to provide his prescribed medications, basic hygiene and adequate food and water. (PAMF, 42.) WCSL state that this is because of George's combative behavior and refusal to eat and drink. (UMF, 30.) Plaintiffs submit that they were never notified that George's needs could not be met and that it was never suggested that Martha take George home or find him new placement. (PAMF, 44.) Defendants state that Martha was notified on October 31, 2017 of George's combativeness and refusal to eat, drink, and take his medication. (UMF, 27.) Plaintiffs claim that George's health rapidly deteriorated while in Defendants' care, but Defendants failed to alert his physicians, Martha,

or the Sate of California. (PAMF, 46.)

George's dementia medication was in the form of a patch, called Exelon patches. (PAMF, 48-49.) Defendants were provided with a thirty-day supply of the Exelon patches in a pre-packaged box. (PAMF, 50.) After George's discharge, all of the patches provided to Defendants were still in the box. (PAMF, 51.) Defendants admit that they never administered this medication to George. (Plaintiffs' Evidence, Exhibit 9, p. 6.)

At the request of George's family, the Department of Social Services, Community Care Licensing investigated the failure to provide the Exelon patches. (PAMF, 53.) The investigation found that WCSL violated 22 C.C.R. § 87465(a)(5) by failing to assist George with medications, which "posed an immediate health and safety risk" to George. (PAMF, 54.) The investigation also determined that WCSL indicated that the Exelon patch was placed on George, which in fact it had not. (PAMF, 54.)

Plaintiffs also submit that the hospital bed provided to George did not incline and decline as it was supposed to, so George was unable to sit up in bed to drink or eat on his own. (PAMF, 58.) George lost approximately 10 to 20 pounds during his stay at WCSL, which Plaintiffs attribute to Defendants' failure to properly feed and hydrate him. (PAMF, 59.) George also began having irregular bowel movements, which had not been a problem before. (PAMF, 60.) Each time Martha visited George, George complained of thirst and Martha would have to assist him with liquids. (PAMF, 62.) After his stay, Plaintiffs submit that George "reeked of odor, was disheveled and unkempt and was extremely dirty, especially in the groin area where urine and feces had crusted." (PAMF, 64.) Plaintiffs also assert that George was left alone in his bed, was socially isolated, and was not provided stimulation or entertainment. (PAMF, 67.) Dates and entries in George's chart are missing; therefore, it cannot be ascertained what medications were administered and how much. (PAMF, 68.)

Standards:

A party moving for summary adjudication of a cause of action must prove that the cause of action has no merit and summary adjudication may only be granted if it completely disposes of the cause of action. (CCP § 437c(f)(1).) "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action." (CCP § 437c(p)(2).) "Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (*Ibid*.)

Analysis:

I. Summary Adjudication of the First Cause of Action for Physical Elder Abuse and the Third Cause of Action for Neglect is Denied.

Defendants argue that these two causes of action lack merit because the declaration of Defendant Mera Shaughnessy establishes that this case does not rise to the level of elder abuse. Defendants argue that there is no evidence of physical abuse and that the claim of neglect is negated by the declaration of Defendant Shaughnessy.

California Welfare & Institutions Code § 15610.63 defines "physical abuse" of an elder as including, in pertinent part, "(d) unreasonable physical constraint, or prolonged or continual deprivation of food or water." Section 15610.57 defines "neglect" of an elder as including, in pertinent part,

> (1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter.
>
> (2) Failure to provide medical care for physical and mental health needs. A person shall not be deemed neglected or abused for the sole reason that the person voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment.
>
> (3) Failure to protect from health and safety hazards.
>
> (4) Failure to prevent malnutrition or dehydration.

"Abuse of an elder," or in other words, "Elder abuse," is defined by Welfare & Institutions Code § 15610.07 as encompassing the following, in pertinent part, "(1) Physical abuse, neglect, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering."

Elder abuse claims must be proven by clear and convincing evidence. (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 406.) Where a plaintiff's ultimate burden of proof will be clear and convincing evidence, the higher standard of proof must be taken into account in ruling on a summary judgment motion. (*Basich v. Allstate Ins. Co.* (2001) 87 Cal.App.4th 1112, 1118-1120; *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 252.) "[I]n ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." (*Anderson v. Liberty Lobby, Inc.* (1986) 477 U.S. 242, 254.)

Defendants argue that Plaintiffs will be unable to meet this burden because "there was no neglect." Defendants have failed to meet their burden of proof on this motion; therefore, the Court does not believe that the burden shifted to Plaintiffs. Even if it had, Plaintiffs have provided evidence to establish the merit of their causes of action. There is evidence that George was in fair health prior to his admission; that Defendants knew of the specific needs that George required given his physical condition; that Defendants failed to administer his dementia medication though it was provided to them; that it is probable that failure to administer his medication caused a decline in George's health; that George lost weight during his residence and exited the facility in bad hygiene; etc.

Defendants have not met their burden on this motion. Rather, a review of the record through

the prism of Plaintiffs' heightened burden of proof at trial demonstrates that Plaintiffs' causes of action have merit.

II. Summary Adjudication of the Fifth and Sixth Causes of Action for Fraudulent Misrepresentation and Fraudulent Concealment is Denied.

Defendants argue that Plaintiffs' fraud causes of action lack merit because the Declaration of Defendant Shaughnessy demonstrates that there were no misrepresentations or concealments made during the admission process or during the term of residence. Defendants submit that this is established because the evidence provides that Defendants made efforts to meet George's needs, but he was combative and refused efforts to care for him. Defendants also submit that Martha Avery was provided with a comprehensive explanation of the services to be provided by Defendants.

Defendants' evidence of the written representations made to Martha Avery does not meet Defendants' burden of proving that Plaintiffs will be unable to prove a fraudulent misrepresentation was made. Furthermore, Defendants' evidence that they disclosed George's refusal to eat and take his medication and the difficulty in bathing him to Martha does not meet the Defendants' burden of proving that Plaintiffs will be unable to prove a fraudulent concealment was made. Rather, though the burden of proof on this motion has not shifted to Plaintiffs, even if the burden had shifted, Plaintiffs have provided evidence to establish a triable issue of material fact regarding both fraud causes of action.

Defendants also argue that Plaintiffs reliance on any misrepresentation was unjustified because the conditions of George's residence was clearly established in the documents signed by Martha Avery and any extrinsic representations to the contrary should have been disregarded. This argument does not establish the lack of a triable issue of material fact regarding the element of justifiable reliance.

III. Summary Adjudication of the Eighth Cause of Action for Unfair Business Practices is Denied.

Defendants cite to *Lee v. Luxottica Retail North America, Inc.* (2021) 280 Cal.App.5th 793, in arguing that Plaintiffs cannot maintain a cause of action for unfair business practices because the remedy for such a cause of action is limited to injunctive relief and restitution is the only monetary remedy available. Defendants recognize that Plaintiffs are seeking restitution in their operative pleading but argue that Defendants have already reimbursed Martha Avery the "unearned amount of payment following Mr. Avery's departure from WCSL." This argument fails to acknowledge that Plaintiffs seek restitution of the *entire* amount paid to Defendants because Plaintiffs allege that it was obtained through fraud. Defendants have not established how this requested relief is insufficient to support this cause of action. Rather, Plaintiffs' cause of action for unfair business practices has a factual dispute for the trier of fact.

IV. Summary Adjudication of the Claim for Punitive Damages is Denied.

Defendants argue that the declaration of Defendant Shaughnessy dispels Plaintiffs' claim for punitive damages on the fraud-based claims, intentional infliction of emotional distress, and abuse/neglect because it shows that the care provided to George was reasonable under difficult circumstances and that Martha Avery was apprised of George's condition. Defendants have not shown that summary adjudication of the issue of punitive damages is warranted. Rather, the claim for punitive damages is meritorious.

2. SCV-263588, Amiral v. Szostak

Appearances required.

3&4. SCV-268189, Anderson v. Jones

Matter is continued to July 12, 2023 at 3:00 p.m., pursuant to the stipulation and order to continue hearing on motions to compel.

5. SCV-269355, Valera v. Foppiano

This matter is on for hearing on the issue of the appointment of a partition referee. The Court previously ordered the parties to submit nominations for a partition referee if the parties were unable to reach a stipulation. Prior to the January 6, 2023, hearing, Plaintiff submitted the nomination of Linda Pond for partition referee. However, the Court continued the hearing because Plaintiff failed to comply with the Court's instructions for the parties' nominations, which required:

> The parties' submissions must include adequate information about the nominees' qualifications, compensation requirements, and willingness to act as the referee. Furthermore, the Court will require the referee to post a bond; thus, the nominees must confirm their consent and ability to do so.

(See October 14, 2022 Minute Order.) Plaintiff's counsel had simply submitted his own declaration that Linda Pond is willing to serve as the Court's referee and willing to post a bond. The Court found that this was insufficient to support appointing Linda Pond without a declaration of Linda Pond in confirmation.

Plaintiff's counsel appeared at the January 6th hearing and objected to the continuance because Linda Pond was present at the hearing and ready to make such declarations. However, the matter was being heard by a visiting judge and the visiting judge believed a continuance for the matter to be heard by the Department 18 judge was best.

Since the last hearing, Plaintiff's counsel has still not submitted a declaration by Linda Pond, thus Plaintiff's nomination still does not comply with the Court's previously stated requirements.

Defendants have submitted the declaration of defense counsel Edward McCutchan concerning the willingness of Gary Weiner to be the partition referee in this matter. This nomination also does not comply with the previously stated requirements for the parties' nominations. A declaration by a party's counsel alone is insufficient to support the Court's appointment of a nominee.

Since neither party has submitted a sufficient nomination for partition referee, this matter is CONTINUED to March 29, 2023 at 3:00 pm in order for the parties to submit a declaration from the nominee. Any declaration from a proposed nominee must be filed by March 10, 2023. Any objection to a nominee must be filed by March 17, 2023.

6-8. SCV-269513, Castro v. Meacham, III

Defendants' Motion to Quash

Defendants' motion to quash the deposition subpoena propounded by Plaintiff to AT&T is GRANTED. Defendants' request for sanctions is GRANTED in the amount of $4,760. Defendants' counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

As an initial matter, Plaintiff's opposition to this motion was filed late. Plaintiff requests the Court exercise its discretion to consider the late opposition. The Court does exercise its discretion to do so and has considered Plaintiff's opposition. This matter was recently before the Court on a motion filed by Plaintiff for which Plaintiff failed to follow the Rules of Court and the Court warned Plaintiff of the necessity to do so. The Court reiterates that admonition now and informs Plaintiff that any future filings that do not comply with the Rules of Court will not be considered by the Court.

Furthermore, on February 23, 2022, after Defendants' reply brief was timely filed, Plaintiff filed a "supplemental opposition" to this motion. There is no legal basis for filing a supplemental opposition and Plaintiff has not been given permission by the Court to do so. It will not be considered by the Court.

Analysis:

A party, witness, consumer, or employee may bring a motion to quash, condition, or modify a subpoena requiring attendance or production of items before a court, at trial, or a deposition. (CCP § 1987.1.) The court may also on such a motion make an order "as appropriate to protect the person from unreasonable or oppressive demands, including unreasonable violations of the right of privacy of the person." (*Ibid*. See also CCP §§ 1985.3(g), 1985.6(f).)

CCP § 1985.3 provides, "Any consumer whose personal records are sought by a subpoena duces tecum and who is a party to the civil action in which this subpoena duces tecum is served

may, prior to the date for production, bring a motion under Section 1987.1 to quash or modify the subpoena duces tecum." The Code defines "personal records" as including records of a telephone corporation. (CCP § 1985.3(a)(1).) Furthermore, *Carpenter v. United States* (2018) 138 S.Ct. 2206 provides that a person has a privacy interest in his or her cellphone location records. (*Id*. at 2217-2220.)

Plaintiff propounded a deposition subpoena for production of business records to Defendants' cell phone provider, AT&T, seeking the following:

> Any and all billing and phone records of incoming and outgoing text messages, including, but not limited to, the location where the the [sic] messages were placed and received, time, date, and duration of messages, the actual text and picture message sent or received by mobile number (707) 228-8910 to mobile number (707) 481-6314 during the period of December 15, 2021 to January 1, 2022 including but not limited to, any records or documents that may be stored digitally and/or electronically. Account Holders are Thomas Boyd Meacham III and Tija Buckalew. Account numbers are unknown.

(See Decl. of Diane Aqui, Exhibit 1.) This matter is a wrongful termination action and Plaintiff alleges in her complaint that her employment was terminated on April 9, 2021. Thus, her termination occurred approximately 8 months prior to the time frame for which her subpoena demands phone records. Plaintiff has not provided any basis for requesting such information in a time frame after her employment. Plaintiff has also not provided any basis for why the location of the cell phones is necessary or relevant to her case. Rather, the Court finds that the subpoena is overbroad, unduly burdensome and oppressive.

Plaintiff submits in her opposition that she suggested a different time frame for the production that is within her employment period. However, this assertion is not substantiated with foundation in Plaintiff's declaration. Furthermore, Plaintiff has not provided the Court with a suggested amendment to the subpoena. Finally, even if the time frame for production was amended, such would not cure the overbroad and unduly burdensome language of the subpoena. Plaintiff simply argues that the information sought is relevant to determine if violation of public policy was the motivating reason for the termination. Plaintiff has not explained how the specific records sought are necessary for making such a showing. Plaintiff has also not explained how such an objective cannot be met by a more narrow request. Rather, Plaintiff simply asserts that all of the information sought is relevant to Defendants' credibility. Such is insufficient to justify such an overbroad subpoena. The motion to quash the subpoena is granted.

<u>Sanctions:</u>

Defendants requests sanctions be imposed pursuant to CCP § 1987.2 in the amount of $4,760, which reflects the amount of attorney's fees incurred by Defendants for this motion. The Court finds that such sanctions are warranted.

Plaintiff's Motion for Sanctions

Plaintiff's motion for sanctions against Defendants is DENIED. Defendants' request to be awarded their reasonable attorney's fees and expenses in opposing this motion is GRANTED. Plaintiff shall pay Defendants $4,000 in reasonable attorney's fees and expenses. Defendants' counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

Analysis:

Plaintiff requests sanctions in the amount of $8,800 be imposed upon Defendants pursuant to CCP §§ 128.5 and 128.7 on the following grounds:

1) Defendants are estopped from asserting as a defense that Plaintiff willfully breached employment duties owed to defendants, failed to use reasonable care or ordinary diligence in the performance of those duties, failed to use reasonable skill in performing work, failed to comply substantially with all directions provided by defendants, and failed to perform in conformity with the customs of the workplace pursuant to the Labor Code. (These assertions constitute Defendants' Ninth Affirmative Defense in their Amended Answer.)
2) Defendants are estopped from asserting as a defense that Plaintiff's job was "sales and bidding projects"; and
3) Defendants acted in bad faith in making these assertions.

Plaintiff has not provided any basis, and the Court does not find any basis, to show that Defendants are legally estopped from making the above assertions. Rather, Plaintiff argues that Defendants cannot make these assertions because they do not have evidence to support them. The Court notes initially that the Court previously overruled Plaintiff's demurrer to Defendants' Ninth Affirmative Defense in Defendant's First Amended Answer, finding that it was sufficiently pled. Plaintiff's argument that Defendants have not provided any evidence to support the above assertions is inaccurate. Defendants have submitted to the Court their responses to Plaintiff's discovery, which constitute evidence. There has been no showing of bad faith or frivolous conduct on behalf of Defendants to support imposing sanctions against them.

This motion is also denied on the basis that it is procedurally defective. Both CCP § 128.5 and CCP § 128.7 provide that a motion made pursuant to either code section must be made separately from other motions or requests. (CCP § 128.5(f)(1)(A); CCP § 128.7(c)(1).) Plaintiff has improperly combined her sanctions requests under each statute into one motion. Furthermore, Plaintiff failed to comply with the 21-day safe harbor rule for seeking sanctions pursuant to CCP § 128.7. Accordingly, the motion is denied both on the basis that it lacks merit and on the basis that it is procedurally defective.

Pursuant to CCP § 128.5, "If warranted, the court may award to the party prevailing on the

motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion." CCP § 128.7 also provides, "If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion." The Court finds that such an award is warranted. Defendants have requested $4,000 to compensate for 10 hours of attorney time at $400 per hour. The Court finds the request to be reasonable.

Plaintiff's Motion to Compel Further Responses

Plaintiff's motion to compel further responses to special interrogatories, set two, is CONTINUED to June 7, 2023, at 3:00 pm to be heard in conjunction with Plaintiff's motion to compel further responses to special interrogatories, set one. Plaintiff's motion to compel further responses to special interrogatories, set one, that is currently scheduled for hearing on April 19, 2023 is also CONTINUED to June 7, 2023 at 3:00 pm. These two motions are referred to the Discovery Facilitator Program. The clerk of Court shall prepare and serve a Notice and Order re: Inclusion in Discovery Facilitator Program.